

A

PERAK MOTOR CO SDN BHD

v.

ESTATE PEKEBUN KECIL SDN BHD

B

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI J
[ORIGINATING SUMMONS NO: 24-711-2003]
29 SEPTEMBER 2006

C

CIVIL PROCEDURE: *Judgment - Judgment sum and interest - Overpayment - Whether overpaid sum constituted unjust enrichment - Whether liable to refund - Whether also liable to refund accruing interest thereof - Unjust enrichment and restitution - Principle of - Contracts Act 1950, s. 71*

D

Before the High Court, the defendant obtained a judgment against the plaintiff for RM296,806.09 ('principal sum') and interest thereon. Subsequently, the plaintiff paid the defendant a total of RM817,453.37, in satisfaction of the said principal sum and interest. On appeal, the Court of Appeal affirmed the principal sum but reduced the quantum of interest payable to the defendant. Arising from the appellate court's decision, and the resultant overpayment thereof, a sum of RM265,117.57 ('overpayment sum') was refunded by the defendant to the plaintiff. The plaintiff alleged however that the defendant was bound to refund, not only the overpayment sum, but also the interest accruable thereon during the seven years that the defendant had retained the sum, and in the event claimed for a further refund of RM121,038.88. The defendant did not oblige and the plaintiff applied for declaratory relief to recover the interest sum. Before the learned judge herein, the plaintiff argued that the principle of unjust enrichment and restitution ought to apply, since the defendant had retained the overpayment sum and benefited therefrom. The defendant retorted that the claim must fail, *inter alia* on account of s. 11 of the Civil Law Act 1956 (which prohibits the grant of interest upon interest) and *res judicata*.

H

Held (allowing the claim):

I

(1) The terms of s. 71 of the Contracts Act 1950 (on unjust enrichment and restitution) are unquestionably wide. Be that as it may, applied with discretion, they would enable the

- courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations created by contract. (para 10) A
- (2) The defendant had retained the overpayment sum and had benefited from it. To allow the defendant to keep the money and claim benefits from it in the form of interest would tantamount to unjust enrichment. Hence, the plaintiff is entitled to claim for restitution. (para 5) B
- (3) The defendant in retaining the overpayment sum had been unjustly enriched and had rightfully refunded the sum. Be that as it may, the benefit which the defendant had gained by retaining the said sum ought to be quantified in the form of interest that the said sum would have earned during the relevant period, which benefit rightfully belonged to the plaintiff. (para 11) C D
- (4) Interest represents a tangible benefit which the party entitled to is able to enjoy and its deprivation is an actionable cause. A party who has been unjustly enriched by this benefit is liable to make good by restitution. (para 13) E
- (4a) The jurisdiction to make restitution is inherent in every court and is exercisable whenever the justice of the case demands. This is precisely what the plaintiff is asking this court to declare. Therefore, allowing the plaintiff's claim for the sum of RM121,038.88, which is quantified as the amount of interest earned, does not in any way contravene s. 11(1) of the Civil Law Act 1956. (paras 13, 14 & 17) F
- (5) *Res judicata* does not apply to the present case. The Court of Appeal in the earlier suit had merely considered the appeal on merits, whereof it affirmed the decision of the High Court allowing the plaintiff's claim but reduced the rate and amount of interest payable by the plaintiff, resulting in an overpayment by the plaintiff. The present action, on the other hand, is a claim for declaration by the plaintiff that they were entitled to claim a sum of money, which is now quantified as interest, the use and benefits of which they have deprived of. There was no similarity of issues between the present claim and that of the last one. They involved two separate causes of action. (para 18) G H I

[Claim for declarations allowed; plaintiff's further claim for interest on sum of RM121,038 not allowed]

A Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (**refd**)

Barnard v. National Dock Labour Board [1953] 2 QB 18 (**refd**)

Bushall Properties Ltd v. Vortex Properties [1957] 2 All ER 214 (**refd**)

B *Carl-Zeiss-Stiftung v. Rainer and Keeler Ltd & Ors* [1966] 2 All ER 536 (**refd**)

Daewoo Corporation v. Bauer (Malaysia) Sdn Bhd (No 2) [1999] 3 CLJ 417 HC (**refd**)

Fibrosa Spolk Akeyjna v. Fairbairn Law Son Combe Barboer Ltd [1943] AC 32 (**refd**)

C *IKebife Ibeneweka & Ors v. Egbuna Peter & Anor* [1964] 1 MR 219 (**refd**)
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC (**refd**)

Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd [1999] 1 CLJ 1 FC (**refd**)

D *Malaysia United Finance Bhd v. Noormurni Sdn Bhd & Anor* [1988] 1 CLJ 149; [1988] 1 CLJ (Rep) 190 (**refd**)

New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57 (**refd**)

Roger v. Compturi D'Escomte de Paris 24 LT 111 (**refd**)

Sarwari Ainudin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 HC (**refd**)

E *Tan Sri Hj Othman Saat v. Mohamad Ismail* [1982] 2 MLJ 177 (**refd**)
Tengku Maimun Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors [1969] 1 MLJ 110 (**refd**)

Terengganu State Government Development Corporation v. Nadeфинco Ltd [1982] 1 MLJ 365 (**refd**)

F *The Board of Trustees of the Sabah Foundation v. Datuk Syed Kechik Syed Mohamad (No 3)* [2000] 1 CLJ 52 HC (**refd**)

Trans Elite Equipment Rental Sdn Bhd v. PSC Naval Dockyard Sdn Bhd [2003] 4 CLJ 270 HC (**refd**)

Legislation referred to:

G Civil Law Act 1956, s. 11(a)
Contracts Act 1950, ss. 69, 70, 71

Contract Act [Ind], s. 70

Other source(s) referred to:

H Lord Goff of Chieveley & Gareth Jones QC, *The Law of Restitution*, 5th edn, p 11

Pollock and Mulla, *Indian Contract and Specific Relief Act*, 9th edn, p 497

For the plaintiff - James Devadason; M/s Maxwell, Kenion, Cowdy & Jones

For the defendant - S Kanawagi; M/s Khana & Co

I *Reported by WA Sharif*

JUDGMENT**A****Balia Yusof Wahi J:**

[1] The plaintiff claimed that the defendant has been unjustly enriched and filed this application for a declaration that the defendant among others have derived a benefit when they retained an excess sum of RM265,117.57 which was not paid gratuitously to them and having retained the said sum for six years and enjoyed benefits for the use thereof. The plaintiff is further seeking for a declaration that they are entitled for the return of a sum amounting to RM121,038.88 being the interest quantified on the said amount retained by the defendant from 1 July 1984 to 15 October 2002.

B**C**

[2] As a background to the plaintiff's claim, the defendant, Estate Pekebun Kecil Sdn. Bhd. (hereinafter referred to as Espek) had on 13 June 1986 sued the plaintiff, Perak Motor Co. Sdn. Bhd. (hereinafter referred to as Perak Motor) for goods sold and delivered in the sum of RM296,806.09. On 16 October 1996, the High Court gave judgment in favour of Espek whereby Perak Motor was ordered to pay:

D**E**

- i) The amount claimed RM296,806.09
- ii) Interest on the said RM296,806.09 at 14% per annum from 1 July 1984 to the date of judgment 16 October 1996.
- iii) Interest on the said RM296,806.09 at 8% per annum from the date of the judgment 16 October 1996 until full satisfaction.

F

[3] In compliance with the said High Court Order, Perak Motor has by 17 March 1997 paid a total of RM817,453.37 to Espek and in the meantime had lodged an appeal to the Court of Appeal. On 15 October 2002 the Court of Appeal allowed in part the appeal by Perak Motor and granted the following orders:

G**H**

- (i) Judgment for the principal sum RM296,806.09 is affirmed.
- (ii) No interest is payable between 1 July 1984 and to the filing of the writ ie, 13 June 1986.
- (iii) Interest between the date of filing of the writ (13 June 1986) and judgment date of the High Court (16 October 1996) be reduced from 14% to 8% per annum.

I

- A (iv) Interest at 8% per annum between the date of judgment and the date of final satisfaction of judgment remains.

B Following the above decision of the Court of Appeal reducing the rate of interest from 14% to 8% there was therefore an overpayment of RM265,117.57 by Perak Motor (hereinafter referred to as overpayment sum). On 15 November 2002, solicitors for Perak Motor wrote to Espek requesting for the refund of RM265,117.57 and a further sum of RM121,038.88 being interest calculated at 8% per annum on the said overpayment sum as exhibited in exh. "YTC2" of encl. 2. On 17 February 2003 Espek refunded the overpayment sum of RM265,117.57 and *via* a letter dated 18 February 2003 Perak Motor's solicitors accepted the said sum on a without prejudice basis and were still demanding for the interest amount of RM121,038.88 as shown in exh. "YTC5" of the same enclosure.

D [4] The present action is filed by Perak Motor seeking for a declaration among others that they are entitled to recover the said sum of RM121,038.88 which represents the interest on the overpayment sum of RM265,117.57 which Espek had benefited from.

E [5] Foremost in the plaintiff's contention is the principle of restitution and unjust enrichment. For the last seven years (from 17 March 1997 to be exact), Espek has retained the overpayment sum and has benefited from it. To allow Espek to keep the money and claimed benefits from it in the form of interest and for its use which rightfully is not theirs would amount to unjust enrichment and that would in turn entitles Perak Motor to claim for restitution.

G [6] Unjust enrichment and restitution goes hand and hand. Justice Gunn Chit Tuan (as he then was) in *New Kok Ann Realty Sdn. Bhd. v. Development & Commercial Bank Ltd. New Hebrides (in liquidation)* [1987] 2 MLJ 57 in quoting the English decision of *Fibrosa Spolka Akcyjna v. Fairbairn Law Son Combe Barboer Ltd.* [1943] AC 32 stated at p. 64:

I It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit claimed from another which it is against conscience that he should keep. Such remedies in English law are

generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi contract of restitution.

A

[7] Unjust enrichment as a principle of justice has been explained by Lord Goff of Chieveley and Gareth Jones QC in *The Law of Restitution* (5th edn) at p. 11:

B

Most mature systems of law have found it necessary to provide outside the fields of contract and civil wrongs for the restitution of benefits on grounds of unjust enrichment. There are many circumstances in which a Defendant may find himself in possession of a benefit which, in justice, he should restore to the Plaintiff. Obvious examples are where the Plaintiff has himself conferred the benefit on the Defendant through mistake or compulsion. To allow the Defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow. Unjust enrichment is simply, the name which is commonly given to the principle of justice which the law recognises and gives effect to in a *vide* variety of claims of this kind.

C

D

[8] The principle of unjust enrichment and restitution has found a place in our legal system which is embodied in s. 71 of the Contracts Act 1950. The section provides:

E

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

F

[9] Section 71 of the Contracts Act 1950 is similar to s. 70 of the Indian Contract Act. According to Pollock and Mulla on the Indian Contract and Specific Relief Act (9th edn) at p. 497 there is good authority for saying that s. 70 of the Indian Contract Act was framed within its present form with a view to avoid niceties of English Law on the subject of quasi contract. According to the authors of the said book the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment. According to them the principle of unjust enrichment falls under ss. 69 and 70 (ss. 70 and 71 of our Contract Act). But these sections are wider in scope than the doctrine as applied in England and go far beyond it.

G

H

I

- A [10] The terms of s. 71 of the Contracts Acts 1950 are unquestionably wide but applied with discretion they enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. (See: *New Kok Ann Realty Sdn. Bhd. v. Development and Commercial Bank Ltd.* New Hebrides (in liquidation) (*supra*)).
- B

- C [11] On the facts of the case, it is without doubt that in so retaining the overpayment sum, Espek has been unjustly enriched. The payment made by Perak Motor in consequence of the judgment of the High Court is far from being gratuitous and Espek has actually enjoyed the benefits from its retention. The money must have been made use of or could have been used and even if it has not been so, it would have earned interest. Espek has definitely done the right thing in refunding the sum of
- D RM265,117.57 to Perak Motors for no court of law would have allowed them to do so. The benefit which Espek has gained by retaining the overpayment sum may be quantified in the form of interest that the said sum would have earned during the period. That benefit rightfully must belong to Perak Motor and they must
- E be granted the right to enjoy such benefit.

- F [12] Counsel for Espek has strenuously argued that Perak Motor's claim for the said amount should be disallowed on the basis that to so allow would be an infringement of s. 11 of the Civil Law Act 1956 which prohibits the granting of interest upon interest. At first glance, it would appear that what Perak Motor is claiming is definitely the amount of interest that the overpayment sum would have earned over the period. At the same time it has also to be realised that the said amount in truth represents the benefit which Perak Motor is entitled to and which they have been
- G deprived of by Espek. Thus the amount claimed by Perak Motor is not interest *per se*. Interest, according to Saleh Abas FJ in *Terengganu State Government Development Corporation v. Nadefinco Ltd.* [1982] 1 MLJ 365 at p. 368:

- H Interest is a sum of money representing the return for the use or the compensation for the retention by one person a sum of money belonging to or owed to another. In essence it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he
- I had suffered because he had not that use. In other words interest is a compensation for the deprivation of the use of money which he is lawfully entitled to.

[13] In my view, in essence, interest represents a tangible benefit which the party who is entitled to is able to enjoy and its deprivation is an actionable cause. A party who has been unjustly enriched by this benefit is liable to make good by restitution. The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. In *Roger v. Compturi D'Escomte de Paris* 24 L.T. 111 their Lordships of the Privy Council observed that:

The perfect judicial determination which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from have the money restored to them with interest during the time that the money has been withheld.

[14] This is precisely what Perak Motor is asking this court to declare in the instant case.

[15] Reverting to the prohibition of granting interest upon interest, I find comfort in referring to the judgment of my learned brother Mahadev Shankar J in *Sarwari a/p Ainudin v. Abdul Aziz a/l Ainuddin* [1999] 8 CLJ 534. On the application of s. 11(a) of the Civil Law Act 1956, His Lordship relying on the decision in *Bushall Properties Ltd. v. Vortex Properties* [1957] 2 All ER 214 was of the view that since the plaintiff's claim against the defendant in that case does not represent a contractual interest, the argument of the defendant that s. 11(a) of the Civil Law Act 1956 prohibits interest upon interest therefore has no merit. His Lordship came to the above conclusion after having referred to what Oliver J had stated at p. 225 of the report in the *Bushwall Properties Ltd.* case (*supra*) which said:

There is a further point in this connection which counsel for the defendants has raised. The amended statement of claim claimed interest under the Law Reform (Miscellaneous Provision) Act 1934. Section 3(i) of the 1934 Act confers on the court a discretionary power to award interest on damages. Counsel for the defendants draws attention to the fact that the damages here claimed are calculated by reference to interest paid or lost and relates that fact to the provisions of proviso (a) to section 3(1) where it is provided that "nothing in this section ... (a) shall authorize the giving of interest upon interest ..." Thus he argues, in this case the court had no statutory discretion. I cannot accept this submission. It appears to me that the proviso was clearly arrived at the sort of case where an interest bearing debt is sued

- A for (for instance, a mortgage debt or an instalment of interest in arrear). In such a case the court is not to award interest on such part of the sum claimed as represents contractual interest. Although what is claimed here is simply a replacement of a sum of money, the quantum of which is calculated by reference to interest which the plaintiff have had to pay, the sum so claimed
- B is not in any relevant sense interest itself it is the sum payable by way of damages for breach of contract, and I see no reason why it should not be capable of carrying interest in the ordinary way.
- C In my judgment, therefore the discretion conferred by the 1934 Act remains exercisable. In as much as the plaintiffs have had to incur payments which have depleted their general funds, or have lost the use of money which would had it not been paid out for the immediate purchase, have produced an addition to their general funds by way of interest earned, which addition would itself have
- D been available to earn interest. I do not see why in principle interest under the 1934 Act would not be awarded ...

- [16] Abdul Malik J in *Trans Elite Equipment Rental Sdn. Bhd. v. PSC Naval Dockyard Sdn. Bhd.* [2003] 4 CLJ 270 followed the
- E decision of Mahadev Shanker J in *Sarwari's* case. Although the issue there is not directly on the question of interest upon interest but in holding that "judgment debt" must necessarily include both the principal sum claimed and the pre judgment interest and allowing a further interest on both sums, clearly demonstrates the
- F court's liberal approach to the prohibition in s. 11(a) of the Civil Law Act 1956. In *The Board of Trustees of the Sabah Foundation v. Datuk Syed Kechik bin Syed Mohamad (No. 3)* [2000] 1 CLJ 52 Ian Chin J in dealing with the prohibition in s. 11(a) held that the court is not prohibited by anything in s. 11 of the Act from
- G awarding compound interest.

- [17] I am very much persuaded by the judgment of Oliver J and the above quoted cases. As I have indicated earlier in this judgment, the plaintiff, Perak Motor has been deprived of the benefit of the use of the overpayment sum which is now
- H quantified in the form of interest that would have been earned. In my judgment, allowing the claim by Perak Motor for the sum of RM121,038,88 which is quantified as the amount of interest earned does not contravene s. 11(a) of the Civil Law Act 1956.

I

[18] In opposing the claim by Perak Motor, counsel for Espek tried in vain to persuade this court that the claim should be barred on the doctrine of *res judicata*. With the greatest of respect, I do not see how the doctrine of *res judicata* should apply in this present case. No doubt the two parties were involved in an earlier suit in the High Court and subsequently in the Court of Appeal but the issues and the subject matter there were different. The matter which is before this court now has never been adjudicated and no judgment was pronounced by the court in the earlier suit between the parties over the present issue. In the same vein I also do not see how Perak Motor should also be barred by estoppel. (See *Daewoo Corporation v. Bauer (Malaysia) Sdn. Bhd.* (No. 2) [1999] 3 CLJ 417, *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783, *Malaysia United Finance Bhd. v. Noormurni Sdn. Bhd. & Anor* [1988] 1 MLJ 395, *Carl-Zeiss-Stiftung v. Rainer and Keeler Ltd. & Ors* [1966] 2 All ER 536) *Kluang Wood Products Sdn. Bhd. v. Hong Leong Finance Bhd.* [1999] 1 CLJ 1). The court of appeal in the earlier suit between the parties merely considered the appeal on the merits of Espek's case against Perak Motor. The Court of Appeal affirmed the decision of the High Court in allowing Espek's claim and reduced the rate and amount of interest that was payable by Perak Motor. This results in overpayment by Perak Motor which was duly refunded to them. The present action is a claim for declaration by Perak Motors that they are entitled to claim a sum of money which is now qualified as interest of which they have been deprived of its usage and benefits. I fail to see the similarity of the issues in the present claim with that of the last one. They are two separate causes of action. Perak Motor has an undeniable right to bring an action for declaration. The powers of this court to grant a declaration is a discretionary one and without limits. Wan Sulaiman J in the case of *Tengku Maimun binti Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110 at p. 112 adopted the *dicta* in *Barnard v. National Dock Labour Board* [1953] 2 QB 18 at p. 41 wherein it was stated:

I know of no limits to the power of the court to grant declaration except such limits as it may in its discretion impose upon itself.

In the same vein, Viscount Radcliffe in *IKebife Ibeneweka & Ors v. Egbuna Peter & Anor* [1964] 1 MR 219 said at p. 215;

- A ... the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.
- B [19] To be entitled to an action for declaration, one has to show that he has an interest in the subject matter (*Tan Sri Haji Othman Saat v. Mohamad b. Ismail* [1982] 2 MLJ 177). In this respect, Abdul Hamid Omar CJ (as he then was) in setting out the guidelines for the grant of declaratory reliefs gave an enlightening
- C note in the following passages in the case of *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686:
- D The plaintiff has by his originating summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declaration can serve no useful purpose: (See *Mellstrom v. Garner & Ors* [1970] 2 All ER 9). The learned Attorney-General has referred to a textbook on Declaratory Orders, 2nd Edn., by P.W. Young, on the conditions for declaratory orders and has submitted that one of the
- E conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a right; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the Court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one who resolution
- F would be of no practical utility.
- G The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought. (*The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 at 448 per Lord Dunedin).
- H At this juncture, I would refer to *Cox v. Green* [1966] 1 Ch 216 where it was held "that on its true construction, RSC, O. 15 r. 17 (O. 15 r. 16 of our RHC) was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the Court exercised its jurisdiction, one of those principles being that the Court would not make a declaration in a dispute which was not a
- I justiciable dispute.

I would also refer to the case of *Lim Cho Hock v. Government of the State of Perak & Ors.* [1980] 2 MLJ 149 where the Court held that the Court's power to make declaratory judgments is confined to matters justifiable in the Courts, and the binding declarations which it could make under O. 15 r. 16 of the Rules of the High Court 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters. (see also s. 41 Specific Relief Act 1950.)

A

B

In the light of the principles enunciated in the above quoted passages the objection of the learned counsel for Espek suggesting that this court has no jurisdiction over the matter, is I think in the circumstances of this case a bit too far fetched. Counsel's suggestion that Perak Motor has not exhausted its other or alternative remedy namely by appealing to the Federal Court to decide on the issue is also out of context and of no relevance to the factual matrix of the case. Although much effort and persuasion has been advanced by the learned counsel, I am not convinced.

C

D

[20] Accordingly, the claim by the plaintiff for declaration is allowed in terms of prayers (1), (2), (3) & 4 of encl. I and costs. The plaintiff's claim for a further interest at 8% per annum on the sum of RM121,038.88 is not allowed. On the defendant's application for stay, I do not find any merits in support of such application and a further order is hereby made refusing a stay of execution.

E

F

G

H

I